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BIGAMOUS MARRIAGE CONTRACTED IN GOOD FAITH.

The case of the Commonwealth *v.* Lillie Philpot, tried in the Circuit Court of Montgomery County, at the February, 1919 Term, upon an indictment for bigamy was one of first impression in Virginia.

Lillie Philpot (nee Nowlin) was regularly married to John Philpot on the 28th day of December, 1911. They lived continuously together as man and wife until the first day of January, 1918 when John Philpot left to work for the Wrought Iron Range Company, his work being between Roanoke and Lynchburg. His wife had heard nothing from him from the date he left until the 10th day of December, 1918, when she read in the Roanoke Times of that day: "John Philpot, colored, died yesterday at Burns Mill and was buried to-day. His wife and one child survive him". On the evening of the same day that this notice appeared in the Roanoke Times, Lillie Philpot dispatched a special delivery letter to John Philpot's brother who lived at Hollins, Virginia, informing him of her husbands' death as reported in the Roanoke Times. It happened that John Philpot was at his brothers' home, upon the arrival of the special delivery letter, very much alive, and asked his brother not to answer same, and it was not answered. Not having heard anything from John's brother about his demise, Lillie wrote the Wrought Iron Range Company for information, and on December 20, 1918, she received a letter in reply stating that John Philpot had left their employ on the 6th day of November, 1918, to go to visit his people at Martinsville, Virginia, further stating that John was complaining of being ill when he left. During the holidays of 1918, Lillie had an application in the person of one William Smith to soothe her sorrows occasioned by the reported death of John, which application she accepted, and they were accordingly married after a few days of ardent courtship. Before the honeymoon had gotten started, one evening, just after dark, in walked John and his unexpected return at once broke up the merry-making and honeymoon.

An indictment followed and upon the trial counsel for Lillie cited and relied upon the very able article of Prof. Raleigh C. Minor reported on page 71 of the 4th Va. Law Register. The

Court following the conclusions of Prof. Minor gave the following instruction: "The Court instructs the jury that if they shall believe from the evidence that the defendant, acting upon information sufficient to satisfy a reasonable mind, honestly believed her husband, John Philpot, to be dead, they should acquit." Upon the facts and the law as given by Judge Moffet, the jury very promptly brought in a verdict of "not guilty".

It will be noted from the article of Prof. Minor that our Virginia statute, sections 4538-39 is a replica of the English statute providing that an absence of one of the married parties for over seven years, unheard of in the meantime, was a good defence to a charge of bigamy and that the English Court had held that the statute having fixed the years of absence as a complete defence did not mean to preclude the further defence of the honest belief of the death of the absent consort. It will be noticed that section 4539 of our new Code has an amendment to section 3782, Code of 1887, to meet the views of Prof. Minor, the amendment being: "nor to a person who can show that the second marriage was contracted in good faith, under a reasonable belief that the former consort was dead." This amendment, the writer submits, was but merely declaratory of the construction that our Court of Appeals would have put upon section 3782 before the amendment made by the new Code.

There seems to be a legal hiatus between sections 4539 and 5113 of our new Code, section 5113 providing that in a divorce case "neither party shall be permitted to marry again for six months from the date of such decree, and such bond of matrimony shall not be deemed to be dissolved as to any marriage subsequent to such decree, or in any prosecution on account thereof, until the expiration of such six months" This is the civil procedure, and there is no penalty attached.

Section 4539 provides in regard to the qualification as a defence to an indictment charging bigamy: "nor to a person who shall, at the time of the subsequent marriage, have been divorced from the bond of the former marriage, although the term at which the decree for divorce was entered had not ended".

Clearly from this, there could be no criminal prosecution for marrying within the prohibited six months provided by section

5113 although it might affect the legitimacy of any children born to such a marriage and might further affect the contingent property rights of the consorts.

Should there be a subsequent marriage after a decree for a divorce, and the defendant should appeal to the Supreme Court of the State within twelve months from the final decree, what would be the status of the second marriage, their property rights or the legitimacy of any children born to the second marriage should the divorce decree be reversed? In the opinion of the writer all rights that would have followed the second marriage would be void and the rights of the first divorced consort would be restored.

John Philpot, after the acquittal of his wife, employed an attorney to institute divorce proceedings against Lillie. The suit was not brought because some able attorneys came to the conclusion that Lillie had become the legal wife of William Smith, but it is the opinion of the writer, in view of the case of Brown against Brown, page 308, Vol. 2, Virginia Decisions, that Lillie is still the lawful wife of John Philpot.

ALLEN I. HARLESS.

Christiansburg, Va.